



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 30, 2013

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

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FROM: Lisa J. Stevenson *LJS for LRA*
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SUBJECT: Proposed Interim Audit Report on the Democratic Party of South Carolina (LRA 886)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report ("IAR") on the Democratic Party of South Carolina ("the Committee"). Our comments address Finding 2 – Excessive Coordinated Party Expenditures.¹ We concur with any findings not specifically discussed in this memorandum. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

¹ We recommend that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the proposed IAR. 11 C.F.R. §§ 2.4(a) and (b)(6).

II. EXCESSIVE COORDINATED PARTY EXPENDITURES (Finding 2)

A. The Slate Card Exemption

The IAR asserts that the Committee reported making coordinated expenditures on behalf of House of Representatives candidate Robert Miller in the amount of \$48,617. Because the applicable coordinated party expenditure limit for State committees in 2010 was \$43,500,² the auditors initially concluded that the Committee exceeded its coordinated party expenditure limit by \$5,117.³ However, following the exit conference, Committee representatives stated that they mistakenly reported a \$10,520 disbursement for door hangers as a coordinated party expenditure, when in fact this disbursement was not an expenditure because the door hangers qualified as "slate cards." See IAR – Democratic Party of South Carolina, at 8. See also 2 U.S.C. § 431(8)(B)(v), (9)(B)(iv); 11 C.F.R. §§ 100.80, 100.140 (excepting spending to prepare and distribute slate cards and sample ballots from the definitions of "contribution" and "expenditure"). The Committee amended its reports to classify the \$10,520 disbursement as Federal Election Activity ("FEA") on Schedule B, line 30(b).⁴ Compare 2010 Post-General Report (3/28/2011) at 149 (reported as coordinated expenditure) and 2010 Post-General Report (11/16/2012) at 141 (reported as FEA disbursement). The auditors agreed with the proposed reclassification after reviewing a sample door hanger that the Committee provided via e-mail.

The sample door hanger has two sides. On one side are photographs of the Committee's candidates for Governor and Congress, accompanied by the names of the candidates and the positions for which they were competing. The photographs are also accompanied by the phrases "Vote Democratic" and "Tuesday November 2," and by information about Election Day voting locations. On the other side are six smaller photographs depicting individuals competing for other State offices. The photographs are accompanied by the names of the individuals and the offices they were seeking. Also accompanying the six photographs at the top of the door hanger on this side is the phrase "One Button lets you vote for all the Democrats on the ballot." Beneath this phrase is a mock ballot containing the names of various political parties on the ballot lines with the Democratic Party ballot line highlighted and checked off, accompanied by the phrase "Official Ballot 2010 General Election[,] November 2010 [,] Straight Party." At the bottom of the door

² See 2 U.S.C. § 441a(d)(1), (3) and 11 C.F.R. § 109.32(b); see also Notice of Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 75 Fed. Reg. 8353, 8354 (Feb. 24, 2010).

³ Although the Committee reported receiving one or more assignments of coordinated party spending authority from the Democratic National Committee, it was unable to provide supporting documentation in response to the auditors' request. Without documentation to support an increased spending limit, the Committee's coordinated spending limit was \$43,500. See 11 C.F.R. § 109.33(a), (c).

⁴ In order to be FEA, Get Out The Vote (GOTV) activity must be conducted within a specific period of time. See 2 U.S.C. § 431(20)(A)(ii); 11 C.F.R. § 100.24(a)(1)(i), (b)(2)(iii). For the 2010 election cycle, this period began on March 30, 2010 and ended on November 2, 2010. See "Federal Election Activity Dates for 2010" at http://www.fec.gov/pages/bcra/rulemakings/charts_fea_dates_2010.shtml (last viewed May 20, 2013). We recommend that the Audit Division indicate in the report whether the Committee's distribution of the door hangers occurred within that period of time. If it is uncertain whether this is the case, then the Audit Division should inquire of the Committee.

hanger is a reminder to voters to bring adequate proof of registration or identity to the polls, and the phrase "Your Vote for Democrats will Make a Difference."

According to the auditors, the invoice charging the Committee for the door hangers was dated October 19, 2010, and the Committee paid for the door hangers on October 20, 2010, shortly before Election Day on November 2, 2010; the Committee paid for the cost of printing the door hangers entirely with Federal funds; and volunteers distributed all of the door hangers by hand.

The Federal Election Campaign Act and Commission regulations allow State and local committees of political parties to pay for certain political communications qualifying as "slate cards" or as "sample ballots" without counting those payments as "expenditures." 2 U.S.C. § 431(8)(B)(v), (9)(B)(iv); 11 C.F.R. §§ 100.80, 100.140.

The sample door hanger that the Committee provided appears to meet the threshold requirements of the slate card exemption. It is a printed listing of three or more candidates for public office in South Carolina, where the Committee is organized. *See* 11 C.F.R. §§ 100.80, 100.140. Additionally, according to the Committee, the door hangers were distributed by hand and not displayed on broadcasting stations, magazines or other kinds of public political advertising. *Id.*

The Commission has previously addressed the scope of this exemption in a series of advisory opinions and has repeatedly advised that materials subject to the slate card exemption may contain the following information: (1) information identifying candidates by name or by means of a picture; (2) the office or position currently held by the candidates; (3) the elective office being sought by the candidates; (4) party affiliation; and (5) voting information, such as the time and place of an election and instructions on the method for voting a straight party ticket. *See, e.g.,* Advisory Opinion 2008-06 (Virginia Democrats). At the same time, the Commission has determined that the inclusion of additional information may, depending on its nature, preclude materials from qualifying as slate cards. Publications that provide additional biographical information, descriptions of candidates' positions on the issues, or statements of party philosophy, for example, do not qualify under the slate card exemption. *Id.; see also* Advisory Opinions 1978-89 (Withers) and 1978-09 (Republican State Central Committee of Iowa).

Based on the foregoing, it appears that the sample door hanger the Committee provided fits within the parameters of the slate card exemption. The sample door hanger also does not appear to include the additional information identified in the above advisory opinions that would preclude it from being classified as a slate card. There are two aspects of the sample door hanger, however, that warrant further consideration: (1) the presence of additional statements on the door hanger, and (2) the unequal sizes of the candidate photographs in the door hanger.

Regarding the first aspect, the sample door hanger appears to contain messages that potentially go beyond simple "slate card" information. Both the phrases "Vote Democratic" and "Your Vote for Democrats will make a Difference" appear on the hanger. In Advisory Opinion 2008-06 (Virginia Democrats), the Commission concluded that planned publications featuring traditional slate cards on one side and a series of images of candidates accompanied by images of

the American flag, diverse crowds of people in the State, and natural scenery on the other side would qualify as exempt slate cards "provided their content is consistent with the exemption." Advisory Opinion 2008-06 (Virginia Democrats) at 2, 4; *see also id.* at 4 n. 4 (noting that photo of a candidate in a group of people wearing t-shirts with campaign slogans or placards "could disqualify a publication for treatment under the slate card exemption").

According to the legislative history, "[t]he purpose of the provision exempting slatecards is intended to allow State and local parties to educate the general public as to the identity of the candidates of the party. It is the intention of the conferees that the slatecard exemption applies only to lists containing the names of all candidates of a party within the State, displayed with equal prominence." H.R. Rep. 93-1438, at 65 (1974). Another purpose was to "encourage straight party voting." H.R. Rep. No. 93-1239, at 142 (1974) (Supp. View of Rep. Frenzel). Representative Frenzel also commented that it was not the purpose of the exemption "to allow candidates or political committees to circumvent the disclosure provisions and the limitations on contributions and expenditures by waging extensive campaigns using sample ballots, slatecards, and other similar devices, but rather to allow State and local parties to educate the general public." Statement of Rep. Frenzel, 120 Cong. Record, H10334 (daily ed. October 10, 1974).

Here, although the sample door hanger contains two statements that potentially go beyond the scope of the slate card exemption, neither statement appears to convey any additional information or message beyond encouraging straight party voting. The Commission appears to have previously concluded, at least implicitly, that slate cards that contained statements advocating for the election of the represented party would not disqualify an otherwise qualifying publication from the protection of the slate card exemption. *See* MUR 925, First General Counsel's Report, transmitted to Commission April 3, 1979, and Certification, dated April 6, 1979 (concluding slate card "appears clearly exempt"; slate card had exhortations to vote for listed candidates accompanying photographs); MUR 1887, First General Counsel's Report, dated October 10, 1985, and Certification, dated October 23, 1985 (similar conclusion to MUR 925 where publication contained exhortation to vote for Democratic party); MUR 6163 (Houghton County Democratic Committee), Factual and Legal Analysis, at 3-4, n.2, and 6-7 (publication distributed door-to-door as flyer containing statement "Your Houghton Democratic Party is proud to present the 2008 Democratic nominees" found exempt as slate card; same flyer distributed as newspaper insert found not exempt).

Accordingly, we conclude that the additional statements discussed above do not disqualify the door hanger from the slate card exemption. We do recommend, however, that the Audit Division raise this issue in its cover memorandum to the Commission accompanying its report.

Regarding the second aspect of the slate card, the legislative history of the exemption reflects that Congress intended that candidates be displayed on slate cards "with equal prominence," as noted above. In Advisory Opinion 2004-37 (Waters), the Commission observed that a planned brochure that would feature some candidates more prominently than others, and

would include brief commentary by the candidate-requestor about the listed candidates, should not be described as a “sample ballot”.⁵ Advisory Opinion 2004-37 (Waters), n. 1.

In this case, no commentary appears on the sample door hanger. However, the sizes of the candidate photographs are unequal. Additionally, the photographs of the State gubernatorial and the Federal Congressional candidates, which are larger than those of the other candidates, are set off by being placed together on one side of the slate card.

Because the regulations and Commission guidance are silent on this issue and because the Conference Report excerpt cited above seems to require “equal prominence,” we recommend that the Audit Division raise this issue in its cover memorandum to the Commission accompanying its report.

B. The Volunteer Activity Exemption

Finally, we note that, according to information provided by the auditors, the Committee distributed the door hangers through the use of volunteers. This suggests the possibility that the door hangers may qualify as exempt under the “volunteer activity exemption,” which exempts from the definitions of “contribution” and “expenditure” the costs of certain kinds of campaign materials used by state and local political party committees in connection with volunteer activities on behalf of that party’s nominees. 2 U.S.C. § 431(8)(B)(ix) and (9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. This exemption, unlike the slate card exemption, focuses upon the existence and degree of volunteer involvement in the distribution of campaign literature, and not upon the content of the campaign literature itself. *See* Advisory Opinion 2008-06 (Virginia Democrats). We recommend that the Audit Division also consider whether the door hanger satisfies this exemption, focusing on whether the publication was distributed in a manner consistent with applicable Commission regulations.

⁵ We note that because the publication at issue in this advisory opinion was to be produced by a candidate rather than by a State or local committee of a political party, the advisory opinion request did not directly raise a question about whether the slate card exemption applied.